

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES S. WEGE,

Appellant.

No. 38797-2-II

UNPUBLISHED OPINION

Penoyar, A.C.J. — James S. Wege moves this court to permit him to file an appeal of his criminal conviction beyond the usual 30-day time limit, arguing that the trial court never advised him of his right to appeal his conviction. The State concedes that the trial court failed to advise Wege of his right to appeal. Because the record does not reflect that the trial court advised Wege of his right to appeal his judgment and sentence, we allow Wege to file a late notice of appeal and based on the State’s concession, we reverse and remand for further proceedings consistent with *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008).¹

¹ In *Eisfeldt*, 163 Wn.2d at 641, the Washington Supreme Court held:

“...the private search doctrine is contrary to article I, section 7 and is inapplicable to warrantless searches in Washington. We also hold [Michael] Piper lacked authority to consent to the search. As an unconstitutional search, the evidence secured by the detectives during the warrantless searches must be suppressed. Finally we hold the search warrants issued for both the Lacey and Olympia houses were invalid and, accordingly, suppress all evidence seized pursuant to those warrants. We reverse Jason Eisfeldt's conviction and remand the case for further proceedings consistent with this opinion.”

FACTS

In February 2005, after a bench trial on stipulated facts, the trial judge found Wege guilty of two counts of the unlawful manufacture of a controlled substance, with a school bus stop enhancement for each charge. On April 5, 2005, the court sentenced Wege to 27 months' incarceration, and 9 to 12 months' community custody. Although the trial court advised Wege of his right to collaterally attack his judgment, it did not advise Wege of his right to appeal his judgment and sentence. In February 2009, Wege moved us for permission to file an appeal after the usual 30-day time limit.

ANALYSIS

Immediately after sentencing, a trial court is required to advise a defendant of his right to appeal his conviction, and that unless a notice of appeal is filed within 30 days after the entry of judgment, the right to appeal is irrevocably waived. CrR 7.2(b). Additionally, the court's instruction on a defendant's right to appeal must be reflected within the record of proceedings. CrR 7.2(b). "[A] criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right." *State v. Kells*, 134 Wn.2d 309, 312, 949 P.2d 818 (1998). And "the State carries the burden of demonstrating that a convicted defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal." *State v. Tomal*, 133 Wn.2d 985, 988, 948 P.2d 833 (1997).

In this case, the record does not reflect that the trial court advised Wege of his right to appeal his conviction. As a result, we cannot say that Wege voluntarily, knowingly, and intelligently waived or abandoned his right to appeal his conviction. Since the State concedes

Wege was not advised of his right to appeal, it has not carried its required burden of proof. Finally, we note and accept the State's concession that this case must be reversed pursuant to *Eisfeldt*, 163 Wn.2d 628. Therefore we direct that Wege file and this court accept a notice of appeal within 20 days, and that upon that filing, this case is reversed and remanded to the superior court for further proceedings consistent with *Eisfeldt*, 163 Wn.2d 628.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Houghton, J.

Hunt, J.